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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 80-1874

Georgia Patsy,
Petitioner,

v.

Board of Regents of the State of Florida,
a body corporate, for and on behalf of,
Florida International University,

Respondents,

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION AND THE CITY OF HUNTSVILLE, TEXAS

Office and Post Office Address:

1020 Southwest Tower
Austin, Texas 78701
(512) 478-6601

DAVID J. LABREC, Counsel of Record
for Texas Municipal League, the
Texas City Attorneys Association
and the City of Huntsville, Texas

JOHN C. ROSS, JR.
President, Texas City Attorneys
Association

SCOTT BOUNDS
Chairman, Amicus Committee of
Texas City Attorneys Association
and City Attorney of Huntsville,
Texas

QUESTION PRESENTED FOR REVIEW

Is exhaustion of administrative remedies, if available, required before a governmental employee may bring a cause of action in federal court against a governmental entity under 42 U.S.C. s 1983?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	1
STATEMENT OF INTEREST OF AMICI CURIAE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. A Logical Extension of the Monell Decesion Requires Exhaustion of Administrative Remedies Prior to Institution of Federal Court Action Against Governmental Entities by Aggrieved Employees Under 42 U.S.C. § 1983	6
II. A Rule Requiring Exhaustion of Adequate Administrative Remedies is Consistent With the Purposes Underlying 42 U.S.C. § 1983	12
CONCLUSION	16
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

Fair Assessment in Real Estate Association, Inc. v. McNary, 50 U.S.L.W. 4017 (December 1, 1981)	10
Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978)	6,7,8,9
Monroe v. Pape, 365 U.S. 167 (1961)	6
Owen v. City of Independence, 445 U.S. 622 (1980)	7,8,9
Parratt v. Taylor, 101 S.Ct. 1908 (1981)	10
Patsy v. Florida Int'l University, 634 F.2d 900 (5th Cir. 1981)	13,16
Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980)	8
Statutes: 42 U.S.C. § 1983	4,5,6,7,8,9, 10,12,13,16,17

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STATEMENT OF INTEREST OF AMICI

The Texas Municipal League is a nonprofit association of 830 municipalities, including the City of Huntsville, Texas. All of those cities are political subdivisions of the State of Texas. The Texas City Attorneys Association is the association of attorneys who act as legal counsel to those municipalities.

Texas cities collectively employ more than 100,000 police officers, firemen, refuse and utility workers, and a wide variety of other personnel in order to perform the many diverse services required of them.

Most cities provide to their employees written procedures which afford the employees an expeditious and orderly system of review of grievances. In some instances, those procedures may be inadequate or ineffective. However, the issue involved in this case is not the suffi-

ciency or insufficiency of those procedures, but rather whether local officials are to be totally deprived of the opportunity to deal with the grievances of their employees before resort is had to federal court under the auspices of 42 U.S.C. § 1983.

If effective administrative procedural remedies are available to protect the rights of government employees, then unnecessary clogging of federal court dockets is likely reduced. Contra, if local administrative remedies can be totally circumvented by merely citing 42 U.S.C. § 1983, then the danger of a wholesale forfeiture of the principle of local self-government arises and unnecessary federal intrusion into the activities of local governmental entities is encouraged.

SUMMARY OF ARGUMENT

This Court has not previously decided whether the issue of exhaustion of administrative remedies is a condition precedent to bringing an action against a governmental entity under 42 U.S.C. § 1983. A decision in this case, recognizing an exhaustion requirement of the type adopted by the Fifth Circuit below, would allow local governmental entities to conduct internal personnel management functions without compromising the constitutional rights afforded their employees. Such a requirement would be consistent with the purposes of § 1983 and the recent decisions of this Court. An uncompromising no-exhaustion rule, on the other hand, would often subject governmental entities and their employees to unnecessary expenses of litigation when adequate remedies are otherwise available. Moreover, such a rule would be inconsistent with the pur-

poses of § 1983 and would unnecesarily invade the province of authority of local governmental entities by involving the federal courts in local decisions that are not yet final and, in some cases, not yet even rendered.

ARGUMENT

I. A Logical Extension of the Monell Decision Requires Exhaustion of Administrative Remedies Prior to Institution of Federal Court Actions Against Governmental Entities by Aggrieved Employees Under 42 U.S.C. § 1983.

Prior to Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), the federal appellate courts had consistently held that municipalities were not "persons" subject to monetary liability under 42 U.S.C. § 1983. See Monroe v. Pape, 365 U.S. 167 (1961). Local governments disciplined their employees virtually free

of scrutiny by the federal courts. The Monell decision of 1978, however, mandated for the first time that municipalities are "persons" under § 1983 and that they can be sued for monetary damages when the alleged illegal conduct implements a policy of the municipality itself. The Court emphasized in Monell that a respondeat superior relationship alone is insufficient to establish a cause of action under § 1983. After Monell, municipal liability is conditioned upon the "execution of government's policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy"[1] that in fact causes the deprivation of the constitutional rights of an employee.

In Owen v. City of Independence, 445 U.S. 622 (1980), this Court further expanded the scope of § 1983 liability of

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[1] 436 U.S. at 694

municipal entities. Speaking for the majority of the Court, however, Justice Brennan noted that the liability of local governments remains predicated upon unconstitutional action implemented by "a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. In this circumstance--when it is the local government itself that is responsible for the constitutional deprivation--it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government...." 445 U.S. 622, note 39.

After Monell and Owen, therefore, a local municipality may be liable under § 1983, but only where a plaintiff is injured by those who are "the final authority or ultimate repository of city power." Schneider v. City of Atlanta, 628 F.2d 915, 920 (5th Cir. 1980). In actions involving rights of public employees-such as the one presently before this Court--a local munic-

ipality cannot be held liable under § 1983 unless or until an official decision giving rise to the constitutional deprivation is made by the person or persons designated by the local governmental body as the final or ultimate authority to make such personnel decisions.

The violation of a constitutional right of a municipal employee should not give rise to a cognizable § 1983 cause of action unless the official causing the deprivation has the final or ultimate authority to make personnel decisions for the municipal entity. If the entity adopts no administrative remedy, then, consistent with Monell and Owen, the aggrieved employee may pursue his remedy directly to federal court under § 1983. Likewise, when the entity adopts and establishes an administrative remedy, then, consistent with Monell and Owen, the aggrieved employee must resort to those remedies before pursuing any direct

action under § 1983. If, as Petitioner contends, no exhaustion is required, then in the State of Texas alone over 100,000 municipal employees may address their personnel grievances directly to already overburdened Federal Courts. This Court has indicated in recent decisions that it is not the purpose of § 1983 to address matters which can better be resolved elsewhere. Parratt v. Taylor, 101 S.Ct. 1908 (1981); Fair Assessment In Real Estate Association Inc. v. McNay, 50 U.S.L.W. 4017 (December 1, 1981). Until the available administrative remedy has been exhausted, the municipality has taken no official action either as a "person" or "under color of law" to thereby cause a deprivation of a constitutionally protected right of the employee.

Many Texas cities presently have established written grievance procedures as part of their employee personnel policies.[2]

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[2]For example, a survey of 272 cities in Texas conducted in January, 1982 indicates

By adopting those procedures, these cities have designated their ultimate authority for personnel decisions. The act or edict of a public officer does not fairly represent the entity's official policy if the governmental body has vested final authority with a specific policymaker, whether it be the mayor, city council, personnel director, civil service commission or other policy-making authority. Local governmental entities think it simply unfair that they be summoned into federal court to defend against a constitutional claim when its policymakers have adopted policies to right the constitutional deprivations, but those policies are not given reasonable occasion to function.

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that 217 of those cities surveyed (80%) provide written grievance procedures to their employees.

II. A Rule Requiring Exhaustion of Adequate Administrative Remedies is Consistent with the Purposes Underlying 42 U.S.C. § 1983.

Congress has never intended that § 1983 be used to preempt the orderly administrative processes of the states and their political subdivisions. Nor does the historical development of § 1983 indicate that Congress ever intended for the federal judicial system to assume a role as the initial arbiter of public employee complaints, yet petitioner in this cause is asking the Court to place the federal judiciary in that untenable role. Amici submit that the answer lies somewhere short of an extreme that would totally preclude exhaustion of administrative remedies by employees of governmental entities. When there exists a fair, expeditious administrative procedure meeting the minimum conditions recited by the Fifth Circuit in the present case,

a rule requiring exhaustion would go far to protect the interests of petitioners and other potential § 1983 plaintiffs; to allow for a speedier adjudication to protect those interests; and to reduce the need for the use of limited federal judicial resources. Patsy, supra, at 912, 913. Many sound reasons support this approach.

First, a public employee will generally suffer no harm if required to exhaust a meaningful administrative remedy. No constitutional right is jeopardized by requiring that an employee first obtain a final decision from the entity that employs him before he files a federal court action. Unless he can show that irreparable harm will come to him in the course of obtaining the employer's final decision, a potential § 1983 plaintiff should not be allowed to sidestep the available administrative remedy. When no harm can be demonstrated, no cause of action is ripe for adjudication. (In the interest of brevity, Amici herein

adopt the argument in the Brief of Amici States, Section V (Ripeness).

Disputes involving governmental personnel are peculiarly conducive to resolution at the administrative level, especially when local governmental entities are concerned. In those instances, supervisory policymakers and employees often live and work in the same environment and have daily contact with one another. When given some incentive and opportunity to work toward amicable dispute resolution, those directly involved can often resolve the issues without needless resort to federal court. The use of administrative procedures would enhance the expertise of those involved and would lessen the demands upon precious judicial resources. Further, an exhaustion rule would serve as an incentive for governmental entities to improve and expand administrative procedural remedies.

Third, initial resort to fair administrative remedies will allow the op-

portunity for quicker and less costly resolution of personnel grievances. The number of cases on the federal dockets continues to grow thereby causing an ever increasing delay in consideration of each case.[3] Most governmental bodies have the resources to offer timely disposition of employee grievances. Moreover, an employee can often avoid substantial attorneys fees and court costs by initially pursuing available administrative remedies.

Fourth, the basic principles of federalism and comity require exhaustion prior to initiation of federal litigation. (Again, in the interest of brevity, Amici herein adopt the argument in the Brief of Amici States in this regard, Section I).

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[3] For example, West Publishing Company's annotations to § 1983 grew from 253 pages in 1970 to well over 1000 in 1981. The number of civil rights cases filed in federal court increased from 296 in 1961 to over 13,000 in 1979, excluding suits by jail inmates. (In 1980, over 12,500 prisoner civil rights suits were pending, compared to only 218 in 1966.)

In the words of Judge Roney,

> "the citizens of the State have a constitutionally based interest in autonomously running the state business and government to the fullest extent possible, until it collides with the federal constitution. The constitutional collision should come, if at all, at the end of state action, not at the beginning." Patsy, supra, p. 912.

It is submitted that this same argument applies equally when local governmental entities and their employees are involved.

CONCLUSION

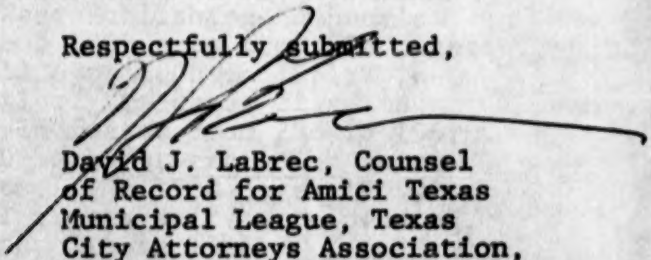
The recent Monell and Owen decisions by this Court have indicated that the purpose of 42 U.S.C. § 1983 is to insure that actions taken by local governmental entities comply with constitutional mandates. When the consitutional rights of their employees are involved, it would simply be unfair to hold municipalities liable as "persons" under § 1983 for alleged injury to employees who refuse to avail themselves of rea-

sonable administrative remedies afforded them.

Moreover, the application of a flexible exhaustion doctrine in § 1983 public employment cases will benefit governmental entities, their employees and the federal courts alike without jeopardizing constitutional rights of the employees. The proper role of the federal courts should be to establish minimum standards with which administrative remedies must conform. Only when no such remedy exists or when the available remedy does not comport with established minimum standards should the federal judicial system, through 42 U.S.C. § 1983, become the initial arbiter of public employee grievances.

This Court should affirm the decision of the Fifth Circuit in this case.

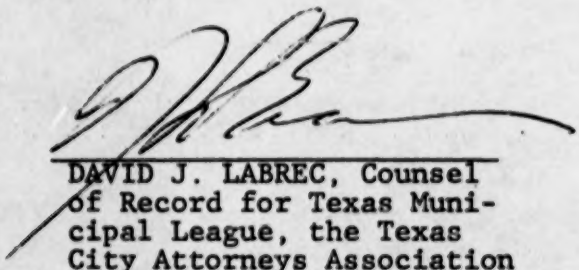
Respectfully submitted,



David J. LaBrec, Counsel of Record for Amici Texas Municipal League, Texas City Attorneys Association, and the City of Huntsville, Texas

PROOF OF SERVICE

I, David J. LaBrec, General Counsel for Texas Municipal League and the Texas City Attorneys Association, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of January, 1982, all parties required to be served have been served with the Brief of Amici Texas Municipal League, Texas City Attorneys Association and City of Huntsville, Texas by mailing copies, postage prepaid, to the counsel listed on the page following:



DAVID J. LABREC, Counsel of Record for Texas Municipal League, the Texas City Attorneys Association and the City of Huntsville, Texas

Office and Post Office Address:

1020 Southwest Tower
Austin, Texas 78701
(512) 478-6601

1. Counsel for Petitioner--

Charles Sims
132 W. 43rd Street
New York, New York 100036

2. Counsel for Respondent--

Jeffrey H. Klink
100 Laura Street
Suite 800
Jacksonville, Florida 32208

3. Counsel for Amici--

National Legal Aid and Defendants Association
Ellen Josephson
1625 K. Street N.W.
Washington, D. C. 20006

National Education and Lawyers Committee for Civil Rights
Micheal Gottesman
1000 Connecticut Avenue N.W.
Washington, D. C. 20036

NAACP Legal, Defense and Education Fund Inc.
Bill Lann Lee
10 Columbus Circle, Suite 2030
New York, New York 10019